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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. [REDACTED] 152

ROBERT W. BARNES,

Petitioner,

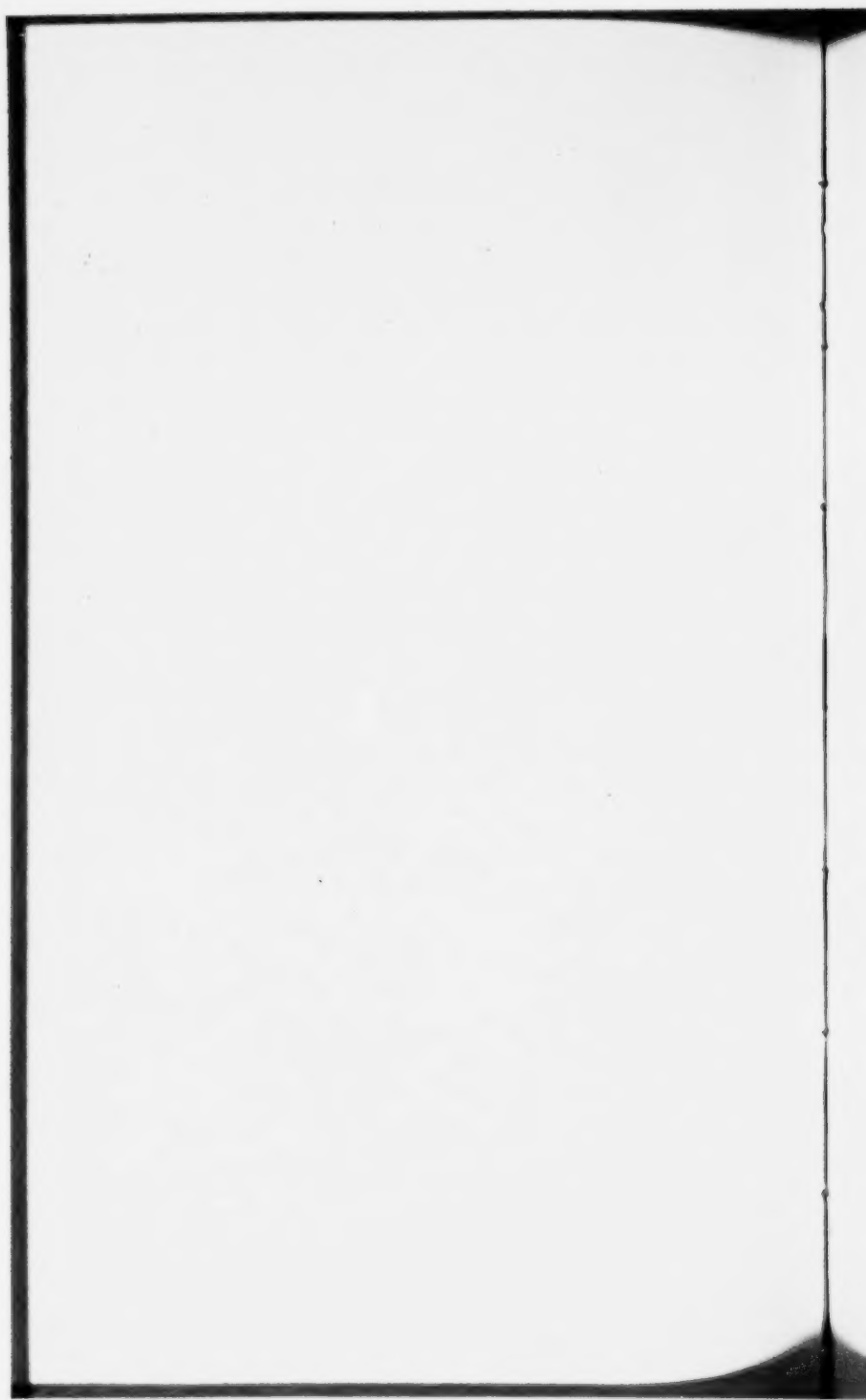
against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

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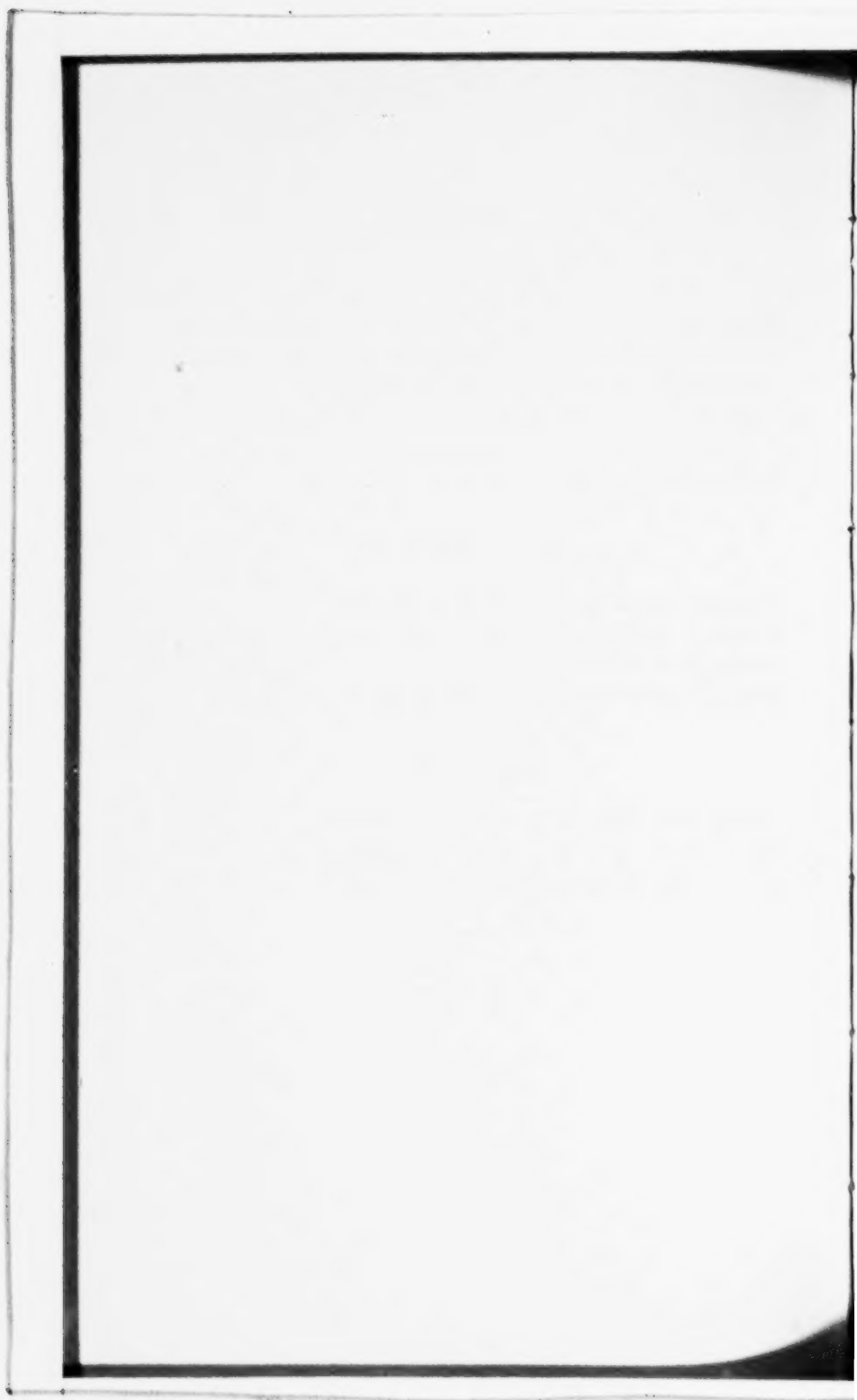
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OCTOBER TERM, 1946.

No. 1313.

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF NEW YORK.**

POINT ONE.

The denial by the Court of Appeals of the State of New York of petitioner's motion to amend its remittitur contravenes the due process of law clause of the Fourteenth Amendment of the United States Constitution.

The petition herein shows that on June 3, 1946, there was pending in the Court of Appeals a motion by him returnable

on May 20, 1946, to amend its remittitur to show that the petitioner raised a Federal Question that his rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution had been violated and had been necessarily passed on and decided by the Court that his rights thereunder had not been violated. This question had been raised in the petitioner's brief in the Court of Appeals and a request therein made that the Court so state in its remittitur should it affirm the judgment of conviction and the same request was made by petitioner's counsel on the argument of the appeal.

On June 13, 1946, the Court of Appeals, by a divided court, denied the petitioner's motion to amend its remittitur and by a *Per Curiam* Memorandum stated it did not consider the constitutional question involved in the admission of the defendant's confession, because under its practice the question was not subject to review in the absence of an exception, and no exception had been taken to the admission of the confessions, citing *Pontius v. People*, 82 N. Y. 339, 346-347; *People v. Cummins*, 209 N. Y. 283; *People v. Pindar*, 210 N. Y. 191. (rec. pp. 657, 658.)

The cases cited by the Court of Appeals are not authority for its holding in the instant case because proper objection was timely made and no exception was necessary until the petitioner's motion to strike out the confessions was made at the close of all the evidence, which motion was made and denied with exception in this case. (rec. pp. 542, 543.)

A confession's admission in evidence is different from the admission of ordinary evidence because the question if the confession was obtained by coercion is, in the first instance, a question of law for the Court, and, when admitted by the

Court, then becomes a question of fact for the jury. After the People's witness, Fitzsimmons, testified on direct examination, over objection, that at no time while he had the defendant in custody prior to his signing both statements was any force or violence or threats whatsoever employed against him, no valid objection was then available to defendant as matter of law because it presented a question of fact and when this evidence, taken with the defendant's evidence, which was corroborated in its essential particulars by the evidence of the People, showed the statements were obtained by coercion, the defendant's motion to strike out the statements presented a question of law for the Court which it could not deny as a matter of discretion. Such motion was made here and denied with exception and was the only way the question could be raised under the practice in New York State. (rec. pp. 542, 543.) When the Court submitted to the jury the question of fact for it to decide if the statements were voluntary (rec. pp. 304, 305, 543, 624) and the jury by its verdict of guilty clearly decided that such statements were voluntary, otherwise the judgment could not be sustained by the evidence, the question was again raised when the defendant immediately moved to set aside the verdict and for a new trial upon all the exception in the case and upon the ground the verdict of the jury was contrary to law and clearly against the evidence, which motion was denied with exception and which could not be denied as a matter of discretion. (rec. p. 640.)

The parts of and the statutes of New York State here involved are as follows:

Sec. 455, Code of Criminal Procedure. "On the trial of an indictment, exception may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced and not otherwise, in any of the following cases: * * * 3. In ad-

mitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging the jury upon the law, on the trial of the issue."

Under this section defendant's motions were made and denied with exception. (rec. pp. 542, 543, fols. 1625-1629 inclusive.)

Sec. 465, Code of Criminal Procedure. "The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases: * * * 6. When the verdict is contrary to law or clearly against the evidence."

Under this section defendant's motion was made and denied with exception. (rec. p. 640, fols. 1918, 1919.)

Sec. 389, Code of Criminal Procedure. "A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily proven, he is entitled to an acquittal."

Under this section defendant's motions were made and denied with exceptions. (rec. pp. 543, 544, fols. 1629, 1630; p. 640.)

After denying defendant's motions made at the close of the case the Court said:

"May I say to the jurors that you are not to be prejudiced in any way against the defendant because I have denied the motions of defendant's Counsel. It simply means that these are questions of fact which I am submitting to you for your determination and not matters of law for my determination." (rec. p. 545.)

The above shows that the trial court did not deny defendant's motions as a matter of discretion and the following from *Platner v. Platner*, 78 N. Y. 90, p. 101, cited in *Pontius v. People*, 82 N. Y. 339, p. 347, cited by the Court of Appeals herein (rec. p. 658) show that Court to have been in error in denying petitioner's motion to amend its remittitur:

"* * * It may be conceded also that when the motion to strike out was made, the defendants had made an end of their evidence as to the Conklin note. The motion to strike out was then made. It was not renewed, nor the matter again noticed. It should have been. 'Evidence admitted either with objection, or properly on an objection, which for any reason should not be considered by the jury or affect the result, is not necessarily stricken out, but may be retained in the discretion of the court, the remedy of the party being to ask for instructions for the jury to disregard it. There was no request to instruct the jury to disregard the evidence, and no exceptions to the charge of the judge in respect to it, and the weight to be given to it;' (see opinion in *MS. of Allen, J., in Marks v. Kind*, * * * 64 N. Y. 628. * * *)"

Accordingly the alleged admissions and confessions of the defendant could not be struck out by the court because they had to be considered by the jury and affected the result but when they, taken in connection with the defendant's testimony, clearly showed that they were obtained by coercion, as in this case, then the defendant's motion to strike them out presented a question of law for the court and it was error to deny defendant's motion with exception and, in view of defendant's proven alibi by two disinterested witnesses (rec. pp. 393-397), his wife (rec. pp. 372-374) and himself (rec. pp. 404, 411-417), the verdict of the jury was contrary to law and clearly against the evidence and these questions were of law and raised by defendant's motions for

his discharge made at the close of the evidence and which were denied with exception (rec. pp. 543, 544) and again on his motion for a new trial upon those grounds which was denied with exception. (rec. p. 640.) This clearly distinguishes the cases of *People v. Cummins*, 209 N. Y. 283 and *People v. Pindar*, 210 N. Y. 191 cited by the Court of Appeals in denying the petitioner's motion to amend its remittitur (rec. p. 658) and shows they are not in point and the petitioner made the very motion suggested in the *Pindar* case to withdraw a juror and ask for a mistrial on account of the admissions of the written confessions which was denied with exception. (rec. p. 543.)

In Conclusion.

The fact the Court of Appeals of the State of New York did not consider the constitutional question involved in the admission of the petitioner's confession is under the record herein a ground alone for granting petitioner's petition for a certiorari herein.

THOMAS L. NEWTON,
Counsel for Petitioner.

